

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Request for Comment on)	MB Docket No. 03-82
Petitions Regarding DIRECTV's)	
DBS Service to the States of)	
Alaska and Hawaii)	

To: Chief, Media Bureau

**COMMENTS OF THE
NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE**

The National Rural Telecommunications Cooperative (NRTC), by its attorneys, hereby submits these Comments in response to the Opposition filed by DIRECTV, Inc. (DIRECTV) in the above-captioned proceeding on April 24, 2003 (Opposition).¹ NRTC -- once again -- has been made a reluctant participant in this dispute, due to misleading statements by DIRECTV relating to NRTC.² NRTC's Comments are submitted to clarify the record and to support the efforts of the State of Hawaii (Hawaii) to require DIRECTV to provide Hawaii with a full array of popular programming, as required by the Commission's rules.

I. BACKGROUND

1. NRTC is a not-for-profit cooperative comprised of 705 rural electric cooperatives, 128 rural telephone cooperatives and 189 independent rural telephone companies located throughout 46 states. Since its creation in 1986, NRTC's mission has been to provide advanced

¹ Public Notice, *Media Bureau Action, Request For Comment On Petitions Regarding DIRECTV's DBS Service To The States Of Alaska And Hawaii*, MB Docket No. 03-82 (released March 25, 2003).

² See, Comments of the National Rural Telecommunications Cooperative, *In the Matter of Application of DIRECTV Enterprises, Inc. For Authority to Launch and Operate a DBS Service Space Station, SAT-LOA-20000505-00086 (DIRECTV-5 Application Proceeding)*, dated September 7, 2000 (*NRTC Hawaii Comments*); Ex Parte Presentation of the National Rural Telecommunications Cooperative, *DIRECTV-5 Application Proceeding*, dated September 22, 2000 (*NRTC Hawaii Ex Parte*).

telecommunications technologies and services to rural America. NRTC's goal is to ensure that rural Americans receive the same benefits of the modern information age as their urban counterparts.

2. On April 10, 1992, NRTC entered into a Direct Broadcast Satellite (DBS) Distribution Agreement, as amended (the DBS Agreement), with Hughes Communications Galaxy, Inc., the predecessor in interest to DIRECTV, to support the development and launch of the first high-powered DBS service in the United States. NRTC, its members and affiliates invested more than \$100 million to capitalize DIRECTV's satellite business. In return, NRTC received among other things the exclusive right to distribute DIRECTV services to subscribers located in certain areas of the country. NRTC, its members and affiliates, currently provide DIRECTV programming to more than 1.7 million households.

3. On June 3, 1999, NRTC filed a lawsuit against DIRECTV in the United States District Court for the Central District of California.³ In the litigation, NRTC alleged that DIRECTV improperly refused to allow NRTC to distribute certain premium programming as required by the DBS Agreement. During the course of the lawsuit, additional issues have been raised by both parties regarding their various rights and obligations under the DBS Agreement.

4. In this same timeframe, the Commission was engaged in a lengthy "Geographic Service Proceeding" to ensure that DIRECTV and other DBS licensees provided programming service to Hawaii and Alaska that was comparable to the programming provided to consumers in the continental United States (CONUS).⁴ Despite initially supporting the Commission's

³ NRTC v. DIRECTV and related actions, CV 99-5666-LGB (CWx) (June 3, 1999, C.D. CA).

⁴ Report And Order, *Revision of Rules and Policies for the Direct Broadcast Satellite Service*, 11 FCC Rcd 9712, IB Docket No. 95-168, PP Docket No. 93-253 (released December 15, 1995) (*DBS Rules Proceeding*); Report And Order, *In the Matter of Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd. 11331, IB Docket No. 98-21 (released June 13, 2002) (*2002 DBS Rules Proceeding*).

efforts,⁵ DIRECTV backed-off once Hawaii pressed its complaints at the Commission regarding DIRECTV's inadequate service offerings.

5. EchoStar Communications, Inc., the only other DBS licensee providing CONUS service, has fully met the requirements of the Commission's Geographic Service Rules.⁶ DIRECTV, however, continued to insist that technical issues prevented it from providing comparable service to Hawaii.⁷ In an ex parte filing several years ago, however, DIRECTV put forth a different explanation.

6. Rather than hiding behind technical issues as a justification for not adequately serving Hawaii, DIRECTV candidly admitted on June 30, 2000, that certain "litigation issues" stemming from its dispute with NRTC, "limit[ed]" its program offerings to Hawaii. Providing nothing in the way of details or explanation, DIRECTV simply stated that since its dispute with NRTC involved "satellite and programming rights," its program offerings to Hawaii were restricted due to an undefined "NRTC limitation."⁸ A copy of relevant portions of DIRECTV's ex parte submission is attached.

⁵ See Comments of DIRECTV, Inc., *DBS Rules Proceeding*, , pp. 25-26, dated November 20, 1995.

⁶ 47 C.F.R. § 25.148(c).

⁷ See e.g., Ex Parte Notice of DIRECTV, Inc., *DIRECTV-5 Application Proceeding*, p. 4, dated September 20, 2000 (containing a September 14, 2000 press release in which DIRECTV announced a "specially designed" programming package for Hawaii. The only reasons cited in the press release for the dearth of core programming (e.g. TBS, CNN, ESPN, C-Span) were the "limits in signal coverage from [the 101° W.L.] orbital location."); see also Ex Parte Notice of DIRECTV, Inc., *DIRECTV-5 Application Proceeding*, pp. 3-4, dated August 3, 2000 (arguing that the only reasons core programming could not be shifted to DIRECTV-1R were the: 1) "massive expense" for new hardware and receiving equipment; and 2) requirement to rely on the damaged TEMPO 1 satellite to provide service to consumers. There is no mention made regarding the impact of the litigation.); see also, Reply Comments of DIRECTV, Inc., *2002 DBS Rules Proceeding*, , pp. 6-7, dated April 21, 1998 (arguing that the Commission's geographic service rules must "not mandate the impossible" and that "any requirement effecting the eastern orbital slots must account for technical limitations at each location.").

⁸ Ex Parte Notice of DIRECTV, Inc., *DIRECTV-5 Application Proceeding*, dated June 30, 2000 (*DIRECTV Ex Parte*).

7. NRTC responded to DIRECTV's misleading ex parte claims on September 7, 2000.⁹ NRTC pointed out that there is no "NRTC limitation" that prevents DIRECTV from providing a full array of popular programming to Hawaii. Rather, NRTC argued that DIRECTV's ex parte submission was a blatant admission that the requested programming services *could* be provided to Hawaii, but that DIRECTV *chose* not to do so. NRTC argued that DIRECTV's decision to deprive Hawaii of the core programming services was a "calculated litigation strategy" against NRTC.¹⁰

8. Hawaii likewise questioned DIRECTV's motives regarding the NRTC litigation and requested further information and clarification from DIRECTV.¹¹ Yet despite NRTC's allegations and Hawaii's repeated requests, DIRECTV provided no clarification of the statements in its earlier ex parte submission and instead remained utterly silent on the issue for almost three years.

9. During this entire period, DIRECTV refused to explain how the NRTC litigation affected service offerings to Hawaii and failed to respond in any substantive manner to the comments of either NRTC or Hawaii.¹² Instead, DIRECTV stonewalled and continued to insist that technical obstacles prevented it from offering expanded programming services to Hawaii.¹³ DIRECTV's "slip of the tongue" during its earlier ex parte presentation -- when it candidly

⁹ *NRTC Hawaii Comments*.

¹⁰ *NRTC Hawaii Comments*, p. 9.

¹¹ Reply of the State of Hawaii, *DIRECTV-5 Application Proceeding*, dated July 24, 2000, p. 4, n. 7 (*Hawaii Reply Comments*)

¹² See e.g., Ex Parte Notice of DIRECTV, Inc., *DIRECTV-5 Application Proceeding*, p. 2, dated September 20, 2000 (arguing that DIRECTV saw "no need to comment further" on the litigation.). In addition, despite repeated promises to provide further information regarding the litigation's alleged impact, DIRECTV failed to provide the requested information. *Hawaii Reply Comments*, n. 7.

¹³ See n. 7 *supra*.

admitted the *real* reason why full service was not being provided to Hawaii -- was shoved under the rug.

10. But then, almost three years later, Hawaii filed a Petition with the Commission seeking administrative sanctions against DIRECTV for its continuing, blatant failure to provide comparable programming services to Hawaii. In response to the Hawaii Petition, DIRECTV has finally been forced to follow-up on its ex parte presentation and admit its true motives in providing second-class service to Hawaii.

11. In its Opposition, DIRECTV attempts to justify its failure to serve Hawaii upon its skewed -- and entirely irrelevant -- interpretation of its DBS Agreement with NRTC. DIRECTV retains its core programming services on DIRECTV-2 (which does not serve Hawaii) and refuses to move them to DIRECTV 1-R (which does serve Hawaii), because it believes that a transfer of core programming from DIRECTV-2 to DIRECTV 1-R would strengthen NRTC's case that DIRECTV 1-R should be used to measure the term of the DBS Agreement.

12. As a result, consumers in Hawaii receive only non-core programming from DIRECTV 1-R rather than core programming. To provide core programming to Hawaii via DIRECTV 1-R, DIRECTV says, would "have a severe economic impact" on DIRECTV due to the dire litigation consequences.¹⁴ This alleged "severe economic impact" means only that DIRECTV's existing contractual arrangement with NRTC might last longer than DIRECTV wants, with DIRECTV continuing to receive millions of dollars annually from NRTC under the arrangement.

¹⁴ *Opposition*, p. 13.

13. DIRECTV's gross failure to comply with the Geographic Service Rules is a misguided attempt to favor a private litigation position over the regulatory process. The NRTC lawsuit is entirely irrelevant to DIRECTV's obligation to comply with the Commission's rules. There is, in fact, no provision in the DBS Agreement that requires DIRECTV to transmit core programming from DIRECTV-2 or restricts DIRECTV from placing core programming services on DIRECTV-1R. The Commission should order DIRECTV to comply with the Geographic Service Rules and should impose administrative sanctions for DIRECTV's willful, repeated and continuing violation.

A. DIRECTV's Private Litigation Strategy With NRTC Is No Justification For Its Failure To Provide Comparable Service To Hawaii.

14. DIRECTV claims that its decision to under-serve Hawaii is justified, because its litigation strategy against NRTC would be jeopardized if it moved core programming from DIRECTV-2 to DIRECTV-1R. According to DIRECTV, the Commission should sit back and await the outcome of the DIRECTV/NRTC litigation before enforcing its Geographic Service Rules. In other words, DIRECTV is asking the Commission to subordinate the public interest to its private interests by adopting DIRECTV's position in private litigation as an excuse to delay enforcement of those rules until some indeterminate time in the future when the litigation (currently scheduled for trial beginning June 3, 2003), including any appeal proceedings, is concluded.

15. It is a longstanding Commission policy to refuse to adjudicate private contracts for which an appropriate forum exists in the courts.¹⁵ There is no reason why the Commission

¹⁵ Memorandum Opinion And Order, *In the Matter of Martin W. Hoffman, Trustee-in-Bankruptcy, for Astroline Communications Company Limited Partnership*, 15 FCC Rcd 22086, (released November 8, 2000) (concluding that a private contractual dispute between the parties was best resolved in a local court with appropriate jurisdiction);

should deviate from that policy here. DIRECTV's regulatory obligations to serve Hawaii stand separate and apart from its litigation posture against NRTC.

16. The Commission need not adjudicate the dispute between NRTC and DIRECTV to conclude that DIRECTV has clearly failed to comply with the Geographic Service Rules. DIRECTV's admits as much in its Opposition. The Commission's rules do not, as DIRECTV suggests, allow exceptions for "imminent litigation," the possibility of "unwarranted claims," or exposure to "threats and accusations."¹⁶ These private contract matters are properly left to the courts, not the Commission.

B. Even if the Commission Decides To Consider The Impact Of Private Litigation, There Is No Provision In the DBS Agreement That Restricts DIRECTV From Placing Core Programming Services On The DIRECTV-1R Satellite That Is Capable Of Serving Hawaii.

17. In June 2000, DIRECTV told the Commission that it could not provide core programming to Hawaii because "Programmer packaging requirements restrict offering due to NRTC limitation."¹⁷ A month later, DIRECTV argued that it was "constrained by . . . certain programmer packaging agreements from including certain additional programming services in the Hawaii Choice lineup."¹⁸ Neither of these statements is true.

18. As evidenced by DIRECTV's recent Opposition, there are no programmer packaging requirements that restrict DIRECTV from providing core programming services to Hawaii. Nor

Listeners' Guild, Inc. v. FCC, 813 F.2d 465 (DC Cir, 1987) (noting longstanding Commission policy of refusing to adjudicate private contract law questions for which a forum exists in state court); *Texarkana TV Cable Co. v. Southwestern Electric Power Co.*, 49 RR 2d 1043 (Common Car. Bur., 1981) (concluding that the Commission is not empowered to adjudicate the extent of a party's contractual obligations or to determine the legal impact of a party's failure to fulfill its contractual obligations).

¹⁶ *Opposition*, pp. 12, 13, 14, respectively.

¹⁷ *DIRECTV Ex Parte*, p. 8.

¹⁸ *Opposition and Reply Comments of DIRECTV Enterprises, Inc., DIRECTV-5 Application Proceeding*, n. 17, dated July 17, 2000.

is there any contractual “limitation” in NRTC’s DBS Agreement that prevents DIRECTV from placing core programming on DIRECTV-1R.¹⁹ Instead, as DIRECTV now candidly admits in its Opposition, DIRECTV’s decision not to provide core programming to Hawaii via DIRECTV-1R is solely a result of its self-serving litigation strategy against NRTC.

C. DIRECTV Is In Clear Violation of the Commission’s Geographic Service Rules.

19. Since the launch of DIRECTV 1-R in October, 1999, DIRECTV has been fully capable of providing core programming services to Hawaii. This conclusion is not idle speculation on the part of Hawaii or NRTC, but rather a candid (albeit late) admission by DIRECTV in its Opposition.²⁰

20. The Commission’s Geographic Service Rules are clear: post January 19, 1996, DBS licensees must provide service to Hawaii when technically feasible, unless to do so would require so many compromises in “satellite design and operation as to make it economically unreasonable.”²¹ DIRECTV now concedes that it has “the technical capability” of moving core programming services from DIRECTV-2 (which does not serve Hawaii) to DIRECTV-1R (which does), but claims that it would be economically unreasonable to do so since it would “create risk for DIRECTV in the current NRTC litigation, which could in turn subject DIRECTV to substantial economic exposure.”²²

21. In light of the Commission’s conclusion last June that it is both “technically feasible and economically reasonable” to provide DBS service to Hawaii from the 101° W.L. orbital

¹⁹ Upon request, and with DIRECTV’s consent, NRTC would be pleased to provide a copy of the DBS Agreement for review by the Commission.

²⁰ *Opposition*, pp. 7, 12. DIRECTV states that three satellites, including DIRECTV-1R, “can reach Hawaii.” *Id.* p. 7. Elsewhere, DIRECTV states that it “does not dispute that it has the technical capability of moving certain programming channels from DIRECTV 2 to DIRECTV 1R.” *Id.* p. 12.

²¹ 47 C.F.R. 25.148(c).

location, DIRECTV's claim rings hollow.²³ Under the Commissions' rules, economic unreasonableness must relate to a single set of inter-related factors: *satellite design and satellite operation*. DIRECTV alleges neither of these factors in its Opposition -- just potential litigation impact.

22. In fact, there would be no compromises necessary in satellite design or operations for DIRECTV to provide core programming services to Hawaii. DIRECTV "does not dispute that it has the technical capability of moving certain programming channels from DIRECTV 2 to DIRECTV 1R."²⁴ But rather than adhering to the unambiguous requirements of the Geographic Service Rule, DIRECTV is asking the Commission to create a new and nonexistent exception -- "potential litigation exposure" -- as a justification for failure to comply.

D. The Commission Should Order DIRECTV To Comply With The Geographic Service Rules And Should Impose Administrative Sanctions For Their Violation.

23. It has been more than eight years since the Commission instituted its Geographic Service Rules mandating comparable service to Hawaii. For the last three years, DIRECTV has repeatedly and willfully violated those rules by placing its own self-interests before the Commission's requirements and Hawaii's needs. For three years, DIRECTV has been consciously and deliberately under-serving Hawaii as part of a perceived litigation gambit against NRTC.²⁵ For three years, there has been no public interest justification for DIRECTV to elevate its perceived interest in private litigation above the Commission's Geographic Service Rules.

²² *Opposition*, pp. 12, 14.

²³ *2002 DBS Rules Proceeding*, ¶55.

²⁴ *Opposition*, p.12.

24. For three years, DIRECTV has staunchly maintained that it was somehow not technically feasible to serve Hawaii, while it ignored arguments that it was merely posturing as part of its litigation strategy against NRTC. But now that DIRECTV faces the threat of administrative sanctions, it has finally and unambiguously admitted that it has *chosen* not to fully serve Hawaii -- solely to advance an artificial litigation position against NRTC.

II. CONCLUSION

25. Despite DIRECTV's repeated claims to the contrary, its lack of adequate service to Hawaii has nothing to do with technical restraints and everything to do with its self-serving litigation posturing. The Commission should respond swiftly to DIRECTV's willful and repeated violations of the Commission's rules by ordering it to comply -- finally -- with the Geographic Service Rules and by imposing appropriate administrative sanctions for its extended failure to do so.

Respectfully Submitted,

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May 9, 2003

²⁵ As the Commission recently noted, additional work is needed, "particularly with DIRECTV . . . to ensure that DBS licensees provide the service required under our rules." *2002 DBS Rules Proceeding*, ¶ 53.

Attachments:

DIRECTV Ex Parte Presentation, June 30, 2000

Certificate of Service

Issues With Service Offering



- DBS 2 and 3 are first-generation high-power satellites
 - Limited DC power restricted design to CONUS service
 - Service to Alaska with larger receive antennas
 - No service to Hawaii
- Litigation issues limit program offering
 - Dispute with NRTC involves satellite and programming rights
 - Programmer packaging requirements restrict offering due to NRTC limitation

Excerpt From DIRECTV June 30, 2000 Ex Parte.

CERTIFICATE OF SERVICE

I, HEREBY CERTIFY that on this 9th day of May, 2003, a true and correct copy of the foregoing Reply Comments of the National Rural Telecommunications Cooperative in the Matter of Request for Comment on Petitions Regarding DIRECTV's DBS Service to the States of Alaska and Hawaii (MB03-82) was filed electronically with the Federal Communications Commission and served via courier, First Class Mail or electronic mail upon the following:

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